Supreme Court, U.S.
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No. 01-1128

In The

Supreme Court of the United States

MICHAEL BLACKARD, SHARON BLACKARD, and ASHLEY BLACKARD,

Petitioners,

v.

MEMPHIS AREA MEDICAL CENTER FOR WOMEN, INC., And DR. FAZAL MANEJWALA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT DR. FAZAL MANEJWALA

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QUESTIONS PRESENTED FOR REVIEW

Did the Sixth Circuit correctly decide that there was no judicial bypass procedure during the pendency of the preliminary injunction barring enforcement of Tennessee's Parental Consent for Abortions by Minors Act?

Did the Sixth Circuit correctly decide that, in the absence of a bypass procedure, Respondents were not liable for failing to obtain parental consent?

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STATEMENT OF THE CASE

Respondent Fazal Manejwala does not take issue with most of the facts set forth in the Statement of the Case found in the "Petition for Writ of Certiorari" filed by Michael Blackard, Sharon Blackard, and Ashley Blackard (hereinafter referred to as "Blackard Petition").

However, the Petitioners contend that a violation of the Parental Consent for Abortions by Minors Act (hereinafter referred to as the "Act") "not only incurs criminal penalties, but also creates civil remedies." Blackard Petition at 3. The Act does not *create* a new cause of action, but merely states that "[n]othing in this part shall be construed to limit the *common law* rights of parents." Tenn. Code Ann. §37-10-307 (emphasis added).

The Act requires that a minor seeking an abortion must have either the consent of a parent or a court order obtained through a judicial bypass procedure waiving the parental consent requirement. Tenn. Code Ann. §§37-10-303, -304. The Act further details the procedures that the state was required to follow in its bypass procedures, including procedures for maintaining confidentiality, ensuring expeditious resolution by a court hearing on a minor's petition, providing adequate assistance through state advocates and, where requested, providing counsel to assist minors. Tenn. Code Ann. §37-10-304; Tenn. Sup. Ct. R. 24. The Act further addresses certain evidentiary matters, including the fact that failure to follow its provisions will be prima facie evidence of a failure to obtain informed consent.

SUMMARY OF THE ARGUMENT

The Act cannot operate to mandate parental consent for a minor's abortion procedure unless there exists an operable judicial bypass procedure as an alternative to the parental consent requirement. Thus, the deciding question in this case is whether there was an operable judicial bypass procedure in place at the time that petitioner Ashley Blackard sought and received the abortion procedure. The district court and the Sixth Circuit correctly found that no judicial bypass procedure was in place due to the issuance of a preliminary injunction in the case of *Memphis Planned Parenthood v. Sundquist*, 2 F. Supp. 2d 997 (M.D. Tenn. 1997) (hereinafter referred to as the "Injunction"). As this question was essentially a question of fact and of state law, this case does not merit review by this Court.

ARGUMENT

I. Respondents cannot be held liable for failure to obtain parental consent in the absence of a judicial bypass procedure.

On September 15, 1997, in *Memphis Planned Parenthood v. Sundquist*, 2 F. Supp. 2d 997 (M.D. Tenn. 1997), the United States District Court for the Middle District of Tennessee issued an Injunction providing as follows:

> . . . that, pending further order of this court, the defendants, their respective officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with

> them, are hereby restrained and enjoined from enforcing Tenn. Code Ann. §§37-10-301 through 37-10-307, the Parental Consent for Abortions by Minors Act.

It is undisputed that the Injunction was in effect on March 26, 1998, when petitioner Ashley Blackard presented at the Memphis Area Medical Center for Women (hereinafter referred to as the "MAMCW") requesting an abortion and the procedure was performed by Respondent Fazal Manejwala. It also is undisputed that a judicial bypass procedure mandated by the Act and by prior holdings of the United States Supreme Court, which would have provided a means for a minor to obtain an abortion via court order, rather than parental consent, was *not* in place at the time of petitioner Ashley Blackard's abortion, due to the issuance of the Injunction.

Although the Sixth Circuit reversed the district court's decision in the case of *Memphis Planned Parenthood v. Sundquist*, 2 F. Supp. 2d 997 (M.D. Tenn. 1997), this ruling does not alter the fact that, at all times relevant hereto, the Injunction was in effect and enforcement of the Act was enjoined by a court that had the authority to issue such an injunction. It is well-settled law that an injunction, however erroneous, must be obeyed until set aside by the court granting it or by an appellate court. *See GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375 (1980); *Walker v. Birmingham*, 388 U.S. 306 (1967) (holding that questions regarding propriety of temporary injunction does not provide grounds for willfully violating injunction); *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922); *Wolff Shoe Co. v. United States*, 141 F.3d 1116

(Fed. Cir. 1998); *Aladdin Industries, Inc. v. Associated Transport, Inc.*, 323 S.W.2d 222 (Tenn. Ct. App. 1958); *Segelke v. Segelke*, 584 S.W.2d 211 (Tenn. Ct. App. 1978). An injunction is asserted properly as a defense, even if vacated on appeal.

If a court order granting a preliminary injunction is to have meaning, it must mean that those who would benefit from its terms must be able to rely on it, and not subsequently be subject to penalty for doing so. Any contrary ruling would render the injunction a nullity and violate due process.

The Petitioners rely on the case of *Edgar v. Mite Corp.*, 457 U.S. 624, 627 (1982) (Stevens concurring), for the proposition that a preliminary injunction issued by a federal court does not grant blanket immunity for all persons to violate a duly enacted statute with impunity and that any person who violates said statute, albeit preliminary enjoined, runs the risk that such injunction could be reversed in the future and the person held civilly liable. *See* Blackard Petition at 6. The situation with which the Court was faced in *Edgar* is not analogous to the case at bar. In *Edgar*, Mite Corporation violated several provisions of the Illinois Business Takeover Act, which was in effect at the time of the violations. After committing the violations, Mite sought the issuance of an injunction to avoid prosecution by the Illinois Secretary of State.

In this case, the record is clear that the Act was not applicable at the time of the violations alleged by the Petitioners. Furthermore, even if the situation in *Edgar* were analogous, the portion of the case relied upon by

the Petitioners is dicta and is in the concurring, not the majority, opinion.

In its "Order Denying Motion for New Trial," the district court carefully consid:red the applicability of Justice Stevens' reasoning set forth in his concurring opinion in *Edgar v. Mite Corp.*, 457 U.S. 624 (1982). The district court held as follows:

> Plaintiff, however, argues that the opposite result is compelled by the reasoning contained in Justice Stevens' concurrence in *Edgar v. Mite Corp.*, 457 U.S. 624. *Edgar* involved an Illinois statute imposing certain requirements (such as prior notification to the Secretary of State and the target company) prior to a stock tender offer intended as a "take-over" of the target company. The District Court entered a preliminary injunction against the enforcement of the statute, finding a likelihood that the statute violates the Commerce Clause. Shortly thereafter, Mite Corp. published a tender offer for all outstanding shares of a publicly traded corporation. *See Edgar*, 457 U.S. at 616-630 (discussing the facts of the case). The District Court's injunction was appealed, and both the Court of Appeals and the Supreme Court upheld the findings of the District Court. In deciding the issue of mootness, both appellate courts address Mite's contention that the preliminary injunction was a complete defense to civil or criminal liability under the statute. The Supreme Court declined to decide the issue, however, holding that the issue was not ripe for consideration until the State of Illinois initiated a criminal action against Mite. *Id.* at 630.

Justice Stevens, however, in a well-reasoned concurrence, addressed the merits of the issue and found that the preliminary injunction was not a complete defense to criminal or civil prosecution. Justice Stevens found that "federal judges have no power to grant such blanket dispensation from the requirements of valid legislative enactments." *Edgar*, 457 U.S. at 649. He further wrote: "[a]n individual who is imminently threatened with prosecution for conduct that he believes is constitutionally protected should not be forced to act at his peril. One purpose of the federal declaratory judgment statute is to permit such an individual to test the legality of the state statute before engaging in conduct that is prohibited by its terms." *Id.* at 651.

Apart from the fact that Justice Stevens' views were not endorsed by a majority of the Court, his reasoning in *Edgar* is not controlling for two reasons. The first reasons [sic] is that the Illinois statute made the underlying activity (engaging in corporate take-overs) more difficult, but not impossible to perform without violating the statute. While the preliminary injunction was in effect, individuals who desired to tender a take-over offer without risking violation of the statute needed only to comply with the statute's requirements by registering with the appropriate state entities, giving notice, etc.

In the case *sub judice*, however, Judge Nixon's preliminary injunction made it not just difficult, but impossible for some minors (including Ashley Blackard) to receive abortions without violating the statute. As this Court previously found, the effect of Judge Nixon's order was to

prevent the implementation of the Tennessee judicial bypass procedure. Yet, the Consent Act required minors with unconsenting parents to obtain judicial consent prior to obtaining an abortion. This consent was simply impossible to obtain due to the absence of a bypass procedure. In such circumstances, minors with unconsenting parents were required to violate the statute in order to exercise their fundamental right to an abortion.

The second reason that the *Edgar* case is not analogous is that reliance upon a declaratory judgment action is not constitutionally sufficient recourse in the context of abortion. The right to an abortion is constitutionally protected. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 869 (1992). States may impose certain restrictions upon the right to an abortion, but those restrictions may not impose an "undue burden" on a woman's right to receive an abortion. *Id.* at 874. States may constitutionally require minors to obtain a parent's consent to an abortion, but only if the state also provides a judicial bypass procedure by which the minor may obtain judicial consent to an abortion. *See Bellotti v. Baird*, 443 U.S. 622, 643 (1979). To be constitutional, such bypass procedure must "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti*, 443 U.S. at 644. It cannot be reasonably disputed that requiring a minor to file a declaratory judgment action in federal court in order to obtain an abortion would not meet the constitutional requirements of expediency or confidentiality. *See, e.g., Planned Parenthood of Southern Arizona v. Lawall*, 180 F.3d 1022, 1027-1030 (9th

> Cir. 1999) (holding that a bypass scheme which did not contain specific deadlines within which the court must rule on the consent request is an "undue burden" on the right to an abortion).
>
> Under *Bellotti*, the constitutionality of Tennessee's parental consent requirement hinged upon the actual implementation of a judicial bypass procedure. The mere theoretical provision of a bypass procedure in an enjoined statute is not sufficient. Even though Judge Nixon's preliminary injunction was ultimately overturned, the fact remains that his injunction had the practical effect of preventing the bypass procedure from becoming a reality during the time that the injunction was in effect. Until such time as the judicial bypass procedure was actually implemented, Tennessee could not constitutionally require minors to obtain parental consent to an abortion, and could not impose civil liability upon persons who failed to comply with the Consent Act.

(R. 143, Order Denying Motion for New Trial, p. 3-6, JA at 682).

The Sixth Circuit also considered the Petitioners' argument that the Respondents, in performing the abortion procedure without parental consent, violated the Act to their own peril. The Sixth Circuit correctly rejected this argument, finding as follows:

> Such a result . . . would unduly burden a minor's right to an abortion. If there is no judicial bypass procedure in place, neither the minor nor her physician can legally be required to seek parental consent. As [Respondents] have noted, to allow this litigation to go forward

would be tantamount to fostering an unconstitutional regime.

Blackard, 262 F.3d at 580.

II. The Injunction precluded the Petitioners from proceeding on claims based on the Act because the Injunction prevented the implementation of a working judicial bypass procedure.

The Petitioners claim that "a Court may not enter an injunction against a person who has not been made a party to the case before it." *See* Blackard Petition at 11. The cases relied upon by the Petitioners in their attempt to nullify the effect of the Injunction are inapposite to the case at bar. Those cases do not address the rules of preclusion where the state has acted in the public interest, thus precluding conflicting private litigation by members of the public. For example, the Petitioners rely upon the case of *Chase National Bank v. Norwalk*, 290 U.S. 431 (1934), for the proposition that due process prohibits binding the Petitioners to a preliminary injunction issued in a prior case of which the Petitioners were not a party, and had no notice. *See* Blackard Petition at 11. But, *Chase National Bank v. Norwalk*, 290 U.S. 431 (1934), involved a dispute between a city and a bank over whether the city could enforce a judgment of ouster when the bank held a valid lien on the property. No dispute concerning the constitutionality of any statute existed and no state official was a party to the suit. Likewise, in the other cases relied upon by the Petitioners, including *Additive Controls and Measurement Systems, Inc. v. Flowdata, Inc.*, 96 F.3d 1390 (C.A. Fed (Tex. 1996)); *Scott v. Donald*, 165 U.S. 107 (1897); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir.

1930); and *Regal Knitware Co. v. National Labor Relations Board*, 324 U.S. 9 (1945), the issues before the courts were whether individuals who were not parties to the lawsuit could be *punished* for violation of the injunction. The injunctions at issue in the aforementioned cases did not involve the enforcement of a statute, nor did the injunctions concern issues of whether individuals could seek civil damages based upon a statute when enforcement of the statute had been enjoined.

When a state is a party to litigation involving matters of general public interest, the state represents all citizens. 18 Moore's Federal Practice, §131.40[3][e], *see also Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958) (judgment effective not only against state, but against citizens who, "in their common public rights" were represented by the state); *Southwest Airlines v. Texas International Airlines*, 546 F.2d 84, 98 (5th Cir. 1977) ("proposition that governments may represent private interest in litigation, precluding relitigation, is clear"); *State of Michigan v. City of Allen Park*, 573 F. Supp. 1481, 1484 n. 5 (E.D. Mich. 1983) ("established law that when a governmental entity litigates a matter involving diffuse private rights . . . private citizens are bound by the results"). A state which defends a statute against a constitutional challenge is presumed to represent the interests of private parties who want the statute enforced. *See, e.g., Keith v. Dailey*, 764 F.2d 1265 (7th Cir. 1985); *see also Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987); *Athens Lumber Co. v. F.E.C.*, 690 F.2d 1364, 1366-67 (11th Cir. 1982). In *Memphis Planned Parenthood v. Sundquist*, 2 F. Supp. 2d 997 (M.D. Tenn. 1997), the

State of Tennessee – which appealed the district court's issuance of the Injunction – vigorously represented the interests of private parties who wanted the Act upheld and enforced. *Id.* at 997.

Injunctive and declaratory relief against the enforcement of a state law, predicated on constitutional grounds, automatically accrues to the benefit of others situated similarly to the plaintiff. *Craft v. Memphis Light, Gas & Water Division*, 534 F.2d 684, 686 (6th Cir. 1975) (affirming refusal to certify a class of plaintiffs whose constitutional rights were purportedly violated on the ground that class certification was unnecessary, as injunctive and declaratory relief, to the extent granted, would "accrue to the benefit of others similarly situated"); *Tolle v. Knoxville's Community Dev. Corp.*, 93 F.R.D. 376, 379 (E.D. Tenn. 1981); *Green v. Williams*, 94 F.R.D. 238, 242 (E.D. Tenn. 1980). In this case, the Respondents are similarly situated to the plaintiff in *Memphis Planned Parenthood*, as both provide abortion services in Tennessee. *See* Answer, ¶ 2, and *Memphis Planned Parenthood v. Sundquist*, 2 F. Supp. 2d at 1008. As such, the Injunction "automatically accrues" to the benefit of the Respondents.

The Injunction issued in *Memphis Planned Parenthood v. Sundquist*, 2 F. Supp. 2d 997 (M.D. Tenn. 1997), precluded enforcement of the Act. Contrary to their assertions, the Petitioners were not enjoined by the Injunction, as they were not required to refrain from any act, nor were they required to perform any act based upon the Injunction. Rather, the Injunction enjoined appropriate state officials from enforcing the Act. Due to the issuance of the Injunction, no judicial bypass procedure was implemented. Because no judicial bypass procedure was

implemented, Respondents could not be required to obtain parental consent from Petitioners Michael and Sharon Blackard prior to performing the abortion procedure on Petitioner Ashley Blackard. Moreover, Respondents could not be subjected to civil liability for failing to obtain parental consent.

If the district court had allowed the Petitioners to proceed on claims *based on the Act*, the district court would have been assuming the role of enforcing the Act for actions performed during a time when the Act had been enjoined preliminarily on the ground that it threatened the constitutional rights of citizens. *See Shelley v. Kramer*, 334 U.S. 1 (1948) (holding court enforcement of restrictive covenants based on race constituted impermissible state action); *cf. Regal Knitware Co. v. National Labor Relations Board*, 324 U.S. 9, 14 (1944) (state "may not nullify a decree by carrying out prohibited acts through aiders or abettors, although they were not parties to the original proceeding").

This Court has expressly held that the fear of damage awards can impose as much of a restriction on constitutional freedoms as a statute that expressly criminalizes behavior. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court explained:

> Presumably a person charged with violation of [a criminal] statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to a defendant in a civil action . . . Whether or not [one exercising his or her constitutional rights] can survive a succession of such judgment, the

> pall of fear and timidity imposed . . . is an atmosphere in which [constitutional] freedoms cannot survive.

Id. at 277-78.

In this case, had the district court allowed the Petitioners to pursue their claims pursuant to the Act, it would have imposed the "pall of fear and timidity" which would have required parental consent before minors could receive abortions. And, because the judicial bypass procedure was inoperative at the critical time due to the issuance of the Injunction, a decision to permit the Petitioners' claims to proceed under the Act would have created "an atmosphere in which constitutional freedoms cannot survive."

Such a result is impermissible when, as here, it results from a court's application of state civil law in a damages action between private parties, no less than when it results from the enactment of a statute. This Court has expressly held that a court may not, in the context of a damages action between private parties, apply state law in a manner that results in an impermissible abridgment of constitutional rights. For instance, in *New York Times v. Sullivan*, this Court considered an appeal from a damages award in a civil libel action against, *inter alia*, the New York Times Company. The complaint in that action alleged that the plaintiff had been libeled by statements in a full page advertisement carried in the *New York Times*. *New York Times*, 376 U.S. at 256. This Court reversed the award of damages, holding that the court's application of state civil law impermissibly abridged liberties guaranteed by the First and Fourteenth Amendments to the United States Constitution. *Id.*

at 277-80. This Court further held that the fear of such damage awards would fatally inhibit the exercise of constitutional rights. *Id.* at 277-78. Finally, this Court held that the Constitution applied even though the suit was between two private parties:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Id. at 265 (citations omitted). *See also Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (holding that First Amendment limits a court's application of state-law tort of intentional infliction of emotional distress).

Similarly, in *Barrows v. Jackson*, 346 U.S. 249 (1953), this Court considered whether the state court had properly sustained a demurrer to a complaint alleging breach of a restrictive covenant barring the use or occupation of specified property "by any person . . . not wholly of the white or Caucasian race." *Id.* at 251. Affirming the lower court's refusal to allow the action to proceed, this Court recognized that "[i]f a state court awards damages . . . a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur." *Id.* at 254. Thus, the damages suit could not proceed because it would impermissibly effectuate an

unconstitutional regime, in which "[s]olely because of their race, non-Caucasians will be unable to . . . enjoy property on the same terms as Caucasians." *Id.* Given that such a regime could neither be effectuated directly by statute, nor in equity by act of judicial enforcement – a result foreclosed by this Court in *Shelley v. Kraemer*, 334 U.S. 1 (1948) – the *Barrows* Court held that it likewise could not be effectuated by compelling the defendant to respond in damages. *Barrows*, 346 U.S. at 258. *See also New York Times*, 376 U.S. at 277 ("What a State may not constitutionality bring about by means of a criminal statute is likewise beyond the reach of its civil law . . . ").

The Petitioners claim that the "Sixth Circuit's interpretation of privity and Rule 65(d) therefore violates due process, since it binds persons who are not parties before the Court." Blackard Petition at 15. In fact, the affidavits of C.R. "Bob" Martin, clerk of the Juvenile Court of Memphis and Shelby County, Tennessee, and Andrew J. Shookhoff, who was a Juvenile Court Judge for Davidson County, Tennessee, at the time of Petitioner Ashley Blackard's abortion, evidence that the Injunction did, in fact, prevent the Tennessee judges from implementing the judicial bypass procedures outlined in the Act. (R. 80, Affidavit, JA at 421). Specifically, Mr. Martin explained that during the time the Injunction was in effect, the Juvenile Court of Memphis and Shelby County, Tennessee did not implement or operate the judicial bypass procedure provided in the Act. (R. 80, Affidavit, p. 2, JA at 421). In his affidavit, Mr. Martin also stated as follows:

> As the Clerk of the Juvenile Court of Memphis, Shelby County, Tennessee, if a citizen had

> attempted to file a petition for a judicial bypass of the Parental Consent for Abortions by Minors Act under Tennessee Supreme Court Rule 24 in March 1998 or at any time when the injunction was in effect, I would have accepted the petition for filing. However, as an officer of the court, I would have obeyed the above referenced injunctive Order of the United States District Court for the Middle District of Tennessee and therefore would not have acted upon the Rule 24 judicial bypass procedure, nor would the Juvenile Court have acted on the petition.

(R. 80, Affidavit, p. 2-3, JA at 421).

The Petitioners now assert that the district court did not rely on the affidavits of Mr. Martin and Judge Shookhoff to make factual findings in its order granting relief, that the local rules of court precluded them from responding further, and that the Petitioners were not required to respond further, as they had responded to two previously filed motions for summary judgment. *See* Blackard Petition at 17-20. None of these arguments has any bearing on the issues which decided this case, as the Petitioners presented no evidence that contradicted the facts set forth in the affidavits of C.R. Martin and Andrew Shookhoff. (R. 99, Supplement Briefing as to Whether the Courts of the State of Tennessee were "in Active Concert and Participation with" Charles Ferrell at all Times Relevant to the Lawsuit, Ex. 2, JA at 478).

The district court, and the Sixth Circuit, properly found that the Tennessee courts were bound by the Injunction against Charles Ferrell, the Administrative Director of the Courts of Tennessee. In a well-reasoned holding, the district court found as follows:

To be in active concert or participation with a party, one need not have supervisory authority or control over the party, as Plaintiffs contend. "Rule 65(d) 'is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented with them *or* subject to their control.' " *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 179 (1973) (emphasis added). *See also Regal Knitware v. NLRB*, 324 U.S. 9, 14 (1945). Plaintiff's argument assumes too narrow a view of the Court's equitable powers.

The Court also finds, on the basis of the record now presented, that the Administrative Director of the Courts of Tennessee acts "in active concert or participation with" the courts of the State of Tennessee, including the juvenile judges who were responsible for implementing the judicial bypass procedure under the Consent Act. By statute, the Director has a duty to "assist the Chief Justice [of the Supreme Court of Tennessee] in the administration of the state court system." Tenn. Code Ann. §16-3-803(a). The Director acts as secretary to the Judicial Council of the State of Tennessee. Tenn. Code Ann. §16-3-502(b). The Administrative Director has statutory duties to "establish criteria, develop procedures, and implement a statewide court system and case management information system." Tenn. Code Ann. §16-3-502(h). The Administrative Director annually collects, compiles, analyzes and publishes caseload statistics pertaining to the state court system. Tenn. Code Ann. §16-3-803(i). The Administrative Director is charged with conducting an "ongoing internal review, analysis, and planning for the future

> needs of the state court system" in order to "devise ways of simplifying court system procedure, expediting the transaction of court system business, and correcting weaknesses in the administration of justice." Tenn. Code Ann. §16-3-803(k). From this review of the Administrative Director's duties, it is clear to the Court that the Administrative Director is in a privity relationship with the courts of the State of Tennessee.
>
> *It is not disputed by the parties that Judge Nixon intended to enjoin Tennessee Courts from implementing the judicial bypass procedure called for by the Consent Act.* Defendants submit the Affidavit of Andrew J. Shookhoff, who was a Juvenile Court Judge for Davidson County, Tennessee, at the time Ashley Blackard's abortion occurred. Shookhoff stated that he presided over a number of abortion bypass proceedings pursuant to the Consent Act during the periods of time when the Act was not enjoined. Shookhoff further states that "[o]n more than one occasion during my tenure, the Act was enjoined by Judge Nixon of the United States District Court. When these injunctions were in effect against the Act, it was my understanding that the juvenile court did not have the legal authority to hear a minor's petitions for judicial waiver of the parental consent requirement." Shookhoff Affidavit at 2.

(R. 115, Order Granting Motion for Relief from Prior Order, p. 10, JA at 607) (emphasis added).

The Petitioners express concern that if the district court's rationale as set forth above is upheld, "public

officials' personal secretaries could be named sole defendants in injunctive relief suits, and bind their employers." *See* Blackard Petition at 15. The Petitioners suggest that the rationale utilized by the district court and upheld by the Sixth Circuit creates such a slippery slope as to transform the law of privity. *See* Blackard Petition at 15. In fact, the district court reviewed the relevant statutes setting forth the duties of the Administrative Director and, based upon the duties of the Administrative Director defined therein and by applying the law of privity, found that the Administrative Director acted "in active concert or participation with" the courts of the State of Tennessee, thus binding the courts to the Injunction. The Sixth Circuit upheld this finding. There is no slippery slope as suggested by the Petitioners.

The Petitioners argue that the district court analyzed the effect of the Injunction as a question of law, not of fact. In so arguing, the Petitioners stated as follows:

> If one examined the Tennessee Parental Consent statute, it entitles a minor to approach a court and seek judicial permission for an abortion without parental consent. *See* Tenn. Code Ann. §37-10-303(b) (App. 47a).
>
> At the time of Ashley Blackard's abortion, a minor had a legal statutory right, to obtain a judicial bypass —since it was contained in the statute. It makes no sense to enquire as a matter of fact whether a judicial bypass is available, since a bypass is a legal right, not a fact.

Blackard Petition at 16.

The Petitioners go on to suggest that the lower courts should not have considered the effect that the injunction

had on the enforcement of a judicial bypass procedure. Blackard Petition at 17.

Whether the district court and the Sixth Circuit analyzed the effect of the Planned Parenthood preliminary injunction upon enforcement of the Parental Consent Act as a question of law or a question of fact does not effect the correctness of the decisions of those courts. As a matter of law and of fact, there was no effective, operable judicial bypass procedure in place at the time that Petitioner Ashley Blackard obtained an abortion. As the Sixth Circuit stated, "a state statute requiring parental consent dies not pass constitutional muster merely because a judicial bypass procedure exists in theory or on paper." Blackard at 576.

III. Where a court issues an injunction which effectively prevents the implementation of a judicial bypass procedure, the Respondents cannot be held liable for not complying with the parental consent requirement or the judicial bypass procedure.

The Petitioners contend that one issue to be decided by this Court is "may the actions of a federal judge be attributed to a state, and make an admittedly constitutional state statute unconstitutional?" *See* Blackard Petition at i. In stating that "[t]he district court's rationale for refusing to allow the Blackards to rely upon the Parental Consent Statute was the fact that the preliminary injunction issued by U.S. District Judge John Nixon blocked enforcement of the judicial bypass procedure and rendered the Parental Consent Act unconstitutional . . . ", the Petitioners mischaracterize the district court's rationale.

See Blackard Petition at 22. In fact, the district court did not find that Judge Nixon's actions rendered the Act unconstitutional. Rather, the district court found that because Judge Nixon's issuance of the Injunction effectively blocked the enforcement of the judicial bypass procedure, Respondents could not be liable for failing to obtain parental consent. (R. 115, Order Granting Motion for Relief from Prior Order, p. 12, JA at 607).

It is well established that in the absence of a judicial bypass procedure, a State may not constitutionally enforce a scheme requiring parental consent for the abortion decisions of minors. *See, e.g., Planned Parenthood of Southern Pennsylvania v. Casey,* 505 U.S. 833, 899 (1992) ("[A] State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure."); *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 440-42 (1983) (holding that a state statute which required parental consent without providing adequate judicial bypass was unconstitutional); *Bellotti v. Baird,* 443 U.S. 622 (1979).

IV. This case does not merit review by this Court.

The constitutional principles relied upon by the Sixth Circuit and the district court are entirely consistent with the precedent of this Court and with the decisions of other federal and state courts. *See* cases cited *infra.* Petitioners have not presented any compelling reason for this Court to exercise its discretionary jurisdiction over the Sixth Circuit's determination that no judicial bypass procedure existed at the time of Petitioner Ashley Blackard's abortion and that, therefore, the Petitioners could not rely

on the Act to impose liability on Respondents for failing to require parental consent.

The Petitioners contend that the courts "are in disarray as to the unresolved question posed by Justice Stevens in *Edgar v. Mite*; does a preliminary injunction grant blanket immunity to all persons who violate a statute, even if the injunction is later vacated on appeal?" In support of this contention, the Petitioners cite *Young Women's Christian Ass'n v. Kugler*, 463 F.2d 203 (3rd Cir. 1972). *See* Blackard Petition at 26. The Petitioners rely on *YWCA* for the proposition that Respondents Manejwala and MAMCW here should not be protected from the Act for violations of the Act committed during the pendency of the Injunction. *See* Blackard Petition at 26-27. The Petitioners note that the *YWCA* court held that in the absence of a class action, a declaratory judgment finding the New Jersey statute criminalizing the performance of abortions would not protect the physicians from criminal prosecution in the event that they violated the statute during the pendency of the appeal and were then unsuccessful on appeal. *See* Blackard Petition at 44.

YWCA is easily distinguishable from the case at bar. Most noteworthy is the fact that the physicians in *YWCA* sought, but did *not* receive, a preliminary injunction enjoining the enforcement of the New Jersey abortion statute. *YWCA* at 203. Thus, the request for injunctive relief having been denied, there was no bar to enforcement of the New Jersey abortion statute during the pendency of the declaratory judgment action.

Moreover, the case of *YWCA v. Kugler* has an extensive history which was not noted by the Petitioners. *See*

Young Women's Christian Ass'n of Princeton v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972), *motion for stay denied*, 463 F.2d 203 (3rd Cir. 1973), *vacated and remanded*, 475 F.2d 1398 (3rd Cir. 1973), *judgment reinstated*, Civil No. 264-70 (D.N.J. July 24, 1973), *aff'd*, 493 F.2d 1402 (3rd Cir. 1974), *cert. den.*, 415 U.S. 989 (1974). The *YMCA* decision upon which the Petitioners rely was decided on June 14, 1972. Thereafter, on January 22, 1973, the Supreme Court declared that a woman's Constitutional right of privacy included the right to obtain an abortion during her first trimester. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973). The *YWCA* district court's final effective judgment entered on July 24, 1973, some six months after the decisions in *Roe* and *Doe*, declared the physicians free from criminal responsibility under the New Jersey abortion statute.

As the June 14, 1972 *YWCA* decision relied upon by the Petitioners was decided prior to the law being established in the cases of *Roe* and *Doe*, as well as the cases of *Bellotti v. Baird*, 443 U.S. 622 (1979) and *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992), it has *no* applicability to the case at bar.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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